(3)

No. 02-121

In The
Supreme Court of the United States

JOSEPH KLAUSER, Warden,

Petitioner,

v.

WILLIAM L. GRAY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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A. Certiorari Is Appropriate Because The Ninth Circuit's Decision Is Inconsistent With The Precedents Of This Court And Improperly Expands The Scope Of Federal Habeas Corpus Review

As shown in the Petition, the Ninth Circuit deviated from the precedents of this Court and greatly expanded federal habeas corpus jurisdiction when it held that habeas corpus relief must be granted when a federal court determines that a state trial court has applied state evidentiary rules in an "uneven" manner. Pet. 7-11. In his Brief in Opposition, Respondent concedes that the Ninth Circuit has adopted a constitutional standard whereby a criminal defendant's constitutional rights to present evidence are defined by the trial court's rulings on the admissibility of the prosecution's evidence. Br. in Opp. 7-10. He tacitly acknowledges that, under this standard, even the erroneous admission of prosecution evidence confers upon a defendant a constitutional right to present "similar" evidence, which right may be vindicated in a federal habeas corpus proceeding. Br. in Opp. 13-14. However, citing six opinions by this Court, Respondent argues that the Ninth Circuit's approach is a "straightforward application" of this Court's precedents. Br. in Opp. 10-11.

Respondent's argument fails because none of this Court's precedents have ever defined a defendant's constitutional rights in terms of what evidence was admitted on behalf of the prosecution. Furthermore, the constitutional standard used by the Ninth Circuit represents a significant expansion of federal habeas corpus jurisdiction because any habeas Petitioner who can claim any inconsistency in evidentiary rulings in his trial has established a

prima facie federal claim. Certiorari is warranted to review the Ninth Circuit's expansion of constitutional analysis that brings state-law evidentiary rulings by state courts within the scope of federal habeas corpus jurisdiction.

1. This Court has never held that a defendant has a constitutional right to present evidence that is "similar" to that presented by the government. Pet. 7-10. On the contrary, this Court has clearly stated that the applicable constitutional standard is whether exclusion of defense evidence has, without sufficient justification, infringed upon a weighty interest of the accused. *United States v. Scheffer*, 523 U.S. 303, 308 (1998). To show a constitutional violation in the exclusion of evidence, a criminal defendant must show that his right to have a jury consider the evidence is a "'fundamental principle of justice.'" *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996) (plurality opinion), citing *Patterson v. New York*, 432 U.S. 197, 201-02 (1977).

Respondent, like the Ninth Circuit, cites to six cases to support his claim that this Court has held that "arbitrary or uneven" application of evidentiary standards violates the Constitution. Br. in Opp. 8-10. In none of these cases, however, did this Court make a defendant's right to present evidence contingent upon what evidence the prosecution presented. Two of the cases cited did not involve application of evidentiary rules at all. *Webb v. Texas*, 409 U.S. 95 (1972); *Cool v. United States*, 409 U.S. 100 (1972). The other four cases, *Rock v. Arkansas*, 483 U.S. 44 (1987); *Green v. Georgia*, 442 U.S. 95 (1979); *Chambers v. Mississippi*, 410 U.S. 284 (1973); and *Washington v. Texas*, 388 U.S. 14 (1967), all involved the

exclusion of evidence related to eyewitnesses' accounts of the crime.

These cases, at most, stand for the proposition that trial courts may not, at least under the facts presented in those cases, exclude evidence of an account of the crime given by a witness who actually saw it or participated in it. There is nothing in the cited cases that suggests that perceived disparities in rulings on evidence by the trial court, by themselves, rise to the level of constitutional significance. Furthermore, there is nothing in these cases suggesting, as Respondent argues, that exclusion of similar evidence offered by the prosecution would cure the constitutional difficulty. Br. in Opp. 13-14. Such a reading would merely ensconce in our Constitution the legal principle that two wrongs make a right or that due process is nothing more than a matter of keeping score. *See Matthews v. Price*, 83 F.3d 328, 332 (10th Cir. 1996).

Rather than support his claims, the cases cited by Respondent show that this Court has consistently measured a criminal defendant's constitutional rights to present evidence by comparing the value of the evidence to the defendant against the state's interests in excluding the evidence, not by reviewing whether the evidentiary ruling excluding defense evidence is consistent with rulings allowing admission of prosecution evidence. Thus, the Ninth Circuit's ruling that a criminal defendant's constitutional right to present evidence is measured by a comparison with evidentiary rulings on behalf of the prosecution is a significant departure from this Court's precedents. Such a departure warrants review by this Court.

2. The Ninth Circuit's ruling that the Constitution requires the federal courts to review state-court evidentiary rulings for consistency represents a significant, and unwarranted, expansion of the scope of federal habeas corpus review. Pet. 10-11. Respondent does not directly challenge this assertion, but instead presents the circular argument that only states that violate the Constitution need concern themselves with the scope of federal habeas corpus review. Br. in Opp. 11 n.1. The scope of federal habeas corpus review, however, far from being limited to a concern of rogue states bent on violating the Constitution, has been a concern of Congress and this Court. 28 U.S.C. § 2241; *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Whether the federal courts have habeas corpus jurisdiction to engage in oversight of the consistency of state-court rulings on state-law issues, under the guise of a defendant's right to present evidence, is an important federal question that deserves review by this Court.

B. Certiorari Is Warranted Because The Ninth Circuit's Decision Is In Conflict With The Decisions Of Other Circuits And Is Inconsistent With The Evidentiary Standards Of Most States

Certiorari is also appropriate in this case because the Ninth Circuit determined that evidence of a third-party's guilt is material, in a constitutional sense, as a matter of law – even if that evidence goes only to a speculative defense theory that the third party committed the crime. Pet. App. 28-29. As shown in the Petition, this determination is directly contrary to the evidentiary standards of many jurisdictions that do allow the exclusion of speculative evidence of third-party guilt and with the decisions of

circuits that have upheld such evidentiary standards against constitutional attack. Pet. 12-22.

The Respondent argues that the split articulated in the Petition is "imaginary" for three reasons. First, he claims that the constitutional standard adopted by the Ninth Circuit is not in actual conflict with the evidentiary standards set forth by the various jurisdictions cited in the Petition, because, he asserts, the Roundy hearsay statements do connect Roundy's ex-boyfriend to the murders. Br. in Opp. 11-13. Second, he argues that the Ninth Circuit was merely applying the balancing test of *Perry v. Rushen*, 713 F.2d 1447 (9th Cir. 1983), which is consistent with the cases cited in the Petition. Br. in Opp. 14-15. Third, he asserts that the circuits that have upheld the exclusion of evidence of third-party guilt against constitutional challenge have merely upheld the exclusion of evidence that was not material to the defense. Br. in Opp. 11-22. These arguments are without merit: the first because it is unsupported by any authority whatsoever, the second because it is unsupportable by even a cursory reading of the opinion below, and the last because it distorts the Petitioner's stated grounds for the Petition.

1. The Ninth Circuit's determination that evidence of even speculative third-party guilt is constitutionally material as a matter of law brings it into conflict with the evidentiary standards of a majority of states and several federal circuits, which exclude evidence that does not directly connect the third party to the crime. Pet. 13-17. Respondent's first counterargument is a claim that there is no conflict because the hearsay evidence of Roundy's ex-boyfriend's motive and threats connected him to the crime, implying that the evidence here in question would have been admissible under the evidentiary standards set forth

in the Petition. Br. in Opp. 12-13. This argument ignores the obvious conflict between the Ninth Circuit's constitutional standard, in which evidence of third-party responsibility is always material, and evidentiary standards that allow exclusion of evidence of third-party responsibility unless the evidence connects the person to the actual commission of the crime. In addition, the implication that evidence of Roundy's ex-boyfriend's motive and threats would have been admissible under such evidentiary standards is, at best, questionable in the face of specific holdings that evidence of motive or motive combined with threats is not admissible without an actual connection of that person to the crime. *See Marrone v. State*, 359 P.2d 969, 984-85 (Alaska 1961); *State v. Soto-Fong*, 928 P.2d 610, 622 (Arizona 1996), *cert. denied*, 520 U.S. 1231 (1997); *People v. Gutierrez*, 52 P.3d 572, 603-05 (California 2002); *State v. Rabellizsa*, 903 P.2d 43, 46-47 (Hawaii 1995); *State v. Russell*, 882 P.2d 747, 780 (Washington 1994).

The constitutional standard applied by the Ninth Circuit is legally incompatible with the evidentiary standards of every state in the Ninth Circuit, as well as many other jurisdictions. Review by this Court is therefore appropriate.

2. The Ninth Circuit determined that, as a matter of law, evidence of third-party guilt is always "material" in a constitutional sense. Pet. App. 28-29. Respondent argues that the Ninth Circuit in this case "simply made the unremarkable observation" that excluded evidence "is subject to the balancing test adopted in *Perry* [*v. Rushen*, 713 F.2d 1447 (9th Cir. 1983)]." Br. in Opp. 14-15. This claim is baseless. At no point in its opinion below did the Ninth Circuit cite to *Perry*. At no point did the Ninth Circuit apply anything even resembling a balancing of

interests. To the contrary, the court specifically stated evidence of third-party guilt is "*critical* exculpatory evidence that the defendant is entitled to adduce" even if the defense theory is "purely speculative." Pet. App. 29 (emphasis original, internal quotations omitted). Neither of the cases cited below for this proposition, *Thomas v. Hubbard*, 273 F.3d 1164, 1177 (9th Cir. 2001), and *United States v. Vallejo*, 237 F.3d 1008, 1022-23 (9th Cir. 2001), cited to *Perry* or applied constitutional balancing tests.

Respondent's argument that the court below merely employed the *Perry* balancing standard, as opposed to declaring evidence of third-party responsibility constitutionally material as a matter of law, is directly contrary to the opinion below. The fact that Respondent prefers to compare the decisions of other circuits cited in the Petition with a *different* Ninth Circuit case, which was not even cited in the opinion below, is telling. The Ninth Circuit has adopted a legal standard that makes evidence of third-party guilt always material for purposes of evaluating a defendant's constitutional rights to present evidence. The constitutional standards applied in *this* case (as opposed to *Perry*) are thus incompatible with those applied in the other circuits set forth in the Petition, and therefore certiorari is appropriate.

3. The Ninth Circuit's decision in this case is contrary to decisions of other circuits that have found no constitutional violation in the exclusion of speculative evidence of a third-party's guilt. Pet. 17-21. The main thrust of Respondent's argument to the contrary is that the cases in the other circuits cited in the Petition are consistent because they did not involve (1) asymmetric application of evidentiary rules that imposed a higher standard on the defendant; or (2) "reliable, trustworthy

and material evidence." Br. in Opp. 19. These arguments do not withstand logical analysis or actual review of the cases cited.

Respondent's claim that there is no split in the circuits because the cases cited in the Petition did not address the claimed asymmetrical application of rules of evidence, as was done in this case, fails for two reasons. First, the Tenth Circuit did specifically address this claim, but found it "without merit" because due process is not merely "an exercise in scorekeeping." *Matthews v. Price*, 83 F.3d 328, 332 (10th Cir. 1996). Second, the argument is irrelevant to the Petition's assertion that there is a split in the legal standards of the circuits for determining the materiality of third-party evidence under the Constitution. Respondent's tacit admission that other circuits have never employed a constitutional standard focused on a claim of asymmetrical application of state evidentiary standards supports the Petition's assertion, made in Subsection A of the Petition, that the Ninth Circuit has deviated from constitutional principles established by this Court. It is completely irrelevant, however, to the Petition's assertion, made in Subsection B of the Petition, that the circuits are split as to the constitutional materiality of speculative third-party evidence.

Respondent's second claim, that the cases are consistent because the Ninth Circuit found the evidence in this case material while the other circuits found the evidence at issue in those cases to not be material, merely begs the question raised in the Petition. The Ninth Circuit concluded that speculative evidence of third-party guilt is constitutionally material as a matter of law, while the other circuits have held that states may exclude such evidence without violating the Constitution. The Petition

is thus not based upon merely different results, but upon irreconcilable legal standards.

Review of the cited cases shows that the Ninth Circuit is the only circuit to hold that a defendant has a constitutional right to present evidence of a third-party's culpability without any evidence of that person's connection to the crime. That holding was premised upon the conclusion that even speculative evidence of third-party guilt is constitutionally material as a matter of law. The four other circuits to specifically address the constitutionality of such standards of evidence have directly or implicitly rejected the idea that a defendant has a constitutional right to present evidence on a speculative theory of third-party guilt. Certiorari is thus appropriate to resolve this split in authority.

CONCLUSION

The Petitioner respectfully requests this Court to grant the Petition and issue a writ of certiorari.

Respectfully submitted,

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